

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

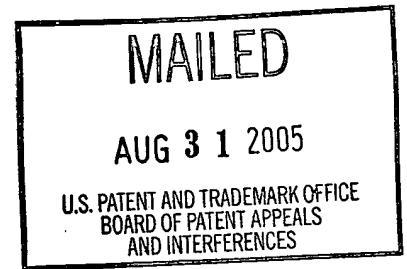
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ERIC JONATHAN BAUER, WASSIM A. MATRAGI,
and BEHROKH SAMADI

Appeal No. 2005-2336
Application No. 09/488,182

ON BRIEF



Before RUGGIERO, BARRY, and LEVY, Administrative Patent Judges.

RUGGIERO Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on the appeal from the final rejection of claims 1, 2, 4, 5, 7, 8, 10, and 11. Claims 3, 6, 9, and 12 have been indicated by the Examiner to be allowable subject to being rewritten in independent form to include all of the limitations of the base claims and any intervening claims.

The claimed invention relates to a method and apparatus for managing congestion in a multi-branch packet network such as an Internet Protocol(IP)-based private branch exchange (PBX) switch. The multi-branch network includes a path through a primary network, such as a wide area network (WAN), and an alternate path through an alternate secondary network such as the public switched telephone network (PSTN). Packet phone adapters (PPAs), which are associated with each packet telephone unit, monitor calls and periodically report delay information to a communication server. The communication server, upon detection of congestion in the underlying primary packet network, will reroute the packet telephone call through the secondary network to preserve voice quality.

Claim 1 is illustrative of the invention and reads as follows:

1. An overload control method for use in a multi-branch Internet Protocol-based private branch exchange system within a network environment having a primary network and at least one alternate network, said method comprising the steps of:

- maintaining a congestion indicator status associated with each path in said primary network, said congestion indicator status indicating whether said path is congested and based on congestion data from at least one device that participated in a packet telephony communication;

receiving a call set up request from a source terminal;

determining if a primary path between said source terminal and a destination terminal is congested using said congestion indicator status; and

routing said call using said at least one alternate network if said primary path between said source terminal and a destination terminal is congested.

The Examiner relies on the following prior art:

Adelman et al. (Adelman)	6,006,259	Dec. 21, 1999
Cruickshank	6,389,005	May 14, 2002 [*]
		(filed Dec. 01, 1997)

Claims 1, 4, 7, and 10 stand finally rejected under 35 U.S.C. § 102(e) as being anticipated by Cruickshank. Claims 2, 5, 8, and 11 stand finally rejected under 35 U.S.C. § 103(a) as being unpatentable over Cruickshank in view of Adelman.

Rather than reiterate the arguments of Appellants and the Examiner, reference is made to the Briefs, the final Office action, and Answer for the respective details.

OPINION

We have carefully considered the subject matter on appeal, the rejections advanced by the Examiner, the arguments in support of the rejections, and the evidence of anticipation and obviousness relied upon by the Examiner as support for the rejections. We have, likewise, reviewed and taken into consideration, in reaching our decision, Appellants' arguments

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set forth in the Briefs along with the Examiner's rationale in support of the rejection and arguments in rebuttal set forth in the Examiner's Answer.

It is our view, after consideration of the record before us, that the disclosure of Cruickshank fully meets the invention as recited in claims 1, 4, 7, and 10. In addition, with respect to the Examiner's obviousness rejection, we are of the opinion that the evidence relied upon and the level of skill in the particular art would have suggested to one of ordinary skill in the art the invention as set forth in claims 2, 5, 8, and 11. Accordingly, we affirm.

At the outset, we note that anticipation is established only when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of a claimed invention as well as disclosing structure which is capable of performing the recited functional limitations. RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir.), cert. dismissed, 468 U.S. 1228 (1984); W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1554, 220 USPQ 303, 313 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

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With respect to each of the appealed independent claims 1, 4, 7, and 10, the Examiner indicates (final Office action, pages 2-4) how the various limitations are read on the disclosure of Cruickshank. In particular, the Examiner directs attention to the illustrations in Figures 1 and 3B of Cruickshank along with the accompanying description beginning at column 1, line 50 of Cruickshank.

After reviewing the Examiner's analysis, it is our opinion that the stated position is sufficiently reasonable that we find that the Examiner has at least satisfied the burden of presenting a prima facie case of anticipation. The burden is, therefore, upon Appellants to come forward with evidence and/or arguments which persuasively rebut the Examiner's prima facie case. Only those arguments actually made by Appellants have been considered in this decision. Arguments which Appellants could have made but chose not to make in the Briefs have not been considered and are deemed to be waived (see 37 CFR § 41.37(c)(1)(vii)).

Appellants' arguments in response to the rejection of independent claims 1, 4, 7, and 10 assert that the Examiner has not shown how each of the claimed features are present in the disclosure of Cruickshank so as to establish a case of anticipation. Appellants' primary point of contention (Brief,

pages 3-5; Reply Brief, pages 3 and 4) is that, in contrast to the claimed invention which monitors congestion in a communication network, Cruickshank merely monitors quality of service (QoS) parameters. In making this argument, Appellants attempt to draw a distinction between the quality of service parameters monitored by Cruickshank such as packet delay, dropped packets, and throughput, and the presently claimed monitoring of congestion.

After reviewing the Cruickshank reference in light of the arguments of record, however, we are in general agreement with the Examiner's position as stated in the Answer. We find no error in the Examiner's line of reasoning (Answer, page 4) which asserts that the monitored parameters such as packet delay and dropped packets in Cruickshank are in fact indicators of network congestion. We find to be particularly noteworthy, as pointed out by the Examiner, that Appellants' own specification at page 8, lines 12-29 describes the monitoring of packet delay and packet loss as indicators of congestion, making it apparent to us that Appellants and Cruickshank are monitoring the same congestion related parameters.

We also find to be unpersuasive Appellants' further contention (Reply Brief, page 3) that Cruickshank does not disclose the setting of a congestion indicator flag as set forth in appealed claims 4 and 10. For all of the reasons discussed supra, we reiterate our finding that the quality of service (QoS) measure determined by Cruickshank is an indicator of network congestion. Further, since there are no recited details of the claimed indicator flag, we find no error in the Examiner's assertion (Answer, page 5) that, as indicated in Cruickshank's Figure 3B flowchart, when the QoS congestion parameter is below a threshold value, the system is set in response to the Y indicator, i.e., flagged, to branch to the alternate PSTN network path.

In view of the above discussion, since all of the claimed limitations are present in the disclosure of Cruickshank, the Examiner's 35 U.S.C. § 102(e) rejection of independent claims 1, 4, 7, and 10 is sustained.

We also sustain the Examiner's 35 U.S.C. § 103(a) rejection of dependent claims 2, 5, 8, and 11 based on the combination of

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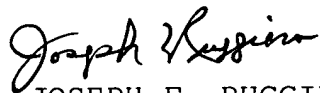
Cruickshank and Adelman. Appellants have chosen to let this rejection stand or fall with the rejection of claims 1, 4, 7, and 10 and have presented no arguments which would convince us of any error in the Examiner's stated position.

In summary, we have sustained both of the Examiner's rejections of the claims on appeal. Therefore, the decision of the Examiner rejecting claims 1, 2, 4, 5, 7, 8, 10, and 11 is affirmed.

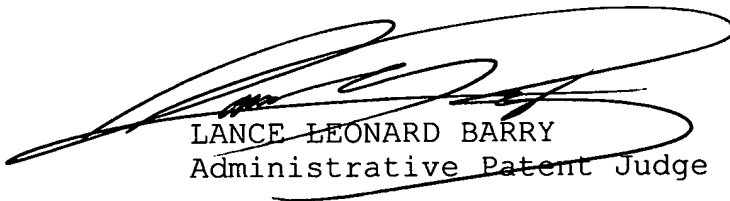
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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a)(1)(iv) (effective September 13, 2004; 69 Fed. Reg. 49960 (August 12, 2004); 1286 Off. Gaz. Pat. and TM Office 21 (September 7, 2004)).

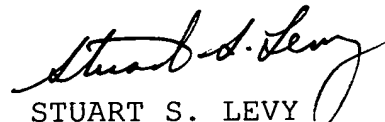
AFFIRMED



JOSEPH F. RUGGIERO
Administrative Patent Judge



LANCE LEONARD BARRY
Administrative Patent Judge



STUART S. LEVY
Administrative Patent Judge

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KEVIN M. MASON
RYAN, MASON & LEWIS, LLP
1300 POST ROAD
STE. 205
FAIRFIELD, CT 06430